

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-216450 **DATE:** December 31, 1984
MATTER OF: Aeromech Industries

DIGEST:

Where IFB provides that small business firms that are also labor surplus area (LSA) concerns will be considered for award before other small business concerns and requests that bidders submit information concerning their LSA status, a bid, at bid opening, must establish a bidder's commitment to perform the contract substantially in an LSA. Information submitted after bid opening may not be considered since it would constitute an improper late modification of the bid.

Aeromech Industries protests the award of a contract to Penn Metal Fabricators, Inc., under the set-aside portion of invitation for bids (IFB) No. DAAJ10-84-B-A149 issued by the Department of the Army for various air delivery components. The IFB provided that small business firms which are located in a labor surplus area (LSA) will be given priority over other small business concerns. Aeromech, which did not indicate in its bid that it was an LSA concern, argues that the Army should have considered information concerning Aeromech's eligibility which was furnished after bid opening.

We deny the protest.

The IFB contained section 52.219-7 of the Federal Acquisition Regulation (FAR), 48 Fed. Reg. 42525 (1983) (to be codified at 48 C.F.R. § 52.219-7), entitled "Notice of Partial Small Business Set-Aside." That provision indicated, that in selecting the awardee for the set-aside portion of the contract, negotiations will first be conducted with small business concerns that are also LSA concerns. Other small businesses would be considered only if negotiations with small businesses that are also LSA concerns were unsuccessful or otherwise did not result in an award for the entire set-aside portion.

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In addition, the IFB contained a clause (I.2) entitled "PREFERENCE FOR LABOR SURPLUS AREA CONCERNS," which required that each bidder desiring to be considered as an LSA concern indicate the LSA where a substantial portion (more than 50 percent) of the contract costs would be incurred. This provision indicated that an offeror's status as an LSA concern could affect entitlement to award in case of tie offers or offer evaluation in accordance with the Buy American Act clause in the solicitation. Part (b) of I.2 clearly stated that "failure to identify the location . . . will preclude consideration of the offeror as an LSA concern."

Aeromech contends that clause I.2 is limited to the specific circumstances set forth in the provision and does not apply to the present case. Aeromech argues that the Army is therefore not precluded from considering the information which was submitted after bid opening and which demonstrated that Aeromech qualified as an LSA concern.

The commitment to incur more than 50 percent of the contract costs in an LSA, which establishes a firm's eligibility as an LSA concern, affects the relative standing of the bidders and their eligibility for award. We therefore have held that this commitment is a material term which must be included with the bid at bid opening and which cannot be waived as a minor informality. Alchemy, Inc., B-208948, Mar. 22, 1983, 83-1 C.P.D. ¶ 284; Reynolds Metals Company, B-209042, Oct. 12, 1982, 82-2 C.P.D. ¶ 328; B-171298, Feb. 8, 1971. To allow a firm to supplement its bid with additional information concerning its status after bid opening would be to permit an improper late modification of its bid. Reynolds Metal Company, B-209042, supra. The only exception to this rule is when the IFB does not contain a provision which elicits sufficient information to determine whether a bidder qualifies for an LSA preference. See, e.g., Allis-Chalmers Corporation, B-195311, Dec. 7, 1979, 79-2 C.P.D. ¶ 397.

Here, we find that to have been eligible for consideration as an LSA concern, Aeromech's bid, at bid opening, would have had to contain Aeromech's express agreement to perform as an LSA concern. Despite the apparent restrictive circumstances in which clause I.2 literally applied, that provision clearly solicited information concerning each bidder's eligibility as an LSA concern and advised bidders that failure to furnish such

information would preclude consideration of the firm as an LSA concern. Because the IFB clearly stated that negotiations would be conducted first with those small business concerns that were also LSA concerns and because the IFB requested bidders to submit information concerning their LSA status with their bids, information submitted after bid opening cannot be considered in determining whether the bidder qualified as an LSA concern.

Accordingly, the Army correctly refused to consider Aeromech as an LSA concern. The protest is denied.

for Milton J. Jordan
Comptroller General
of the United States